Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RAYMOND ZARAGOZA, JR. AND,
TAMMY ZARAGOZA,

Petitioners,

v.

DANIEL G. DAVIS; MICHAEL D.,
DEMPSEY; DEMPSEY & JOHNSON, P.C.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT
DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. ISSUES REGARDING FEDERAL MALICIOUS PROSECUTION.

A. Is there cause of action for federal malicious prosecution?

B. If there is cause of action for federal malicious prosecution, are elements same as state malicious prosecution?

2. ISSUES REGARDING PROBABLE CAUSE[1] TO ARREST IN CIVIL RIGHTS ACTION.

C. Even if exculpatory evidence shows alleged crimes could not have occurred, is allegedly molesting 14 year old daughter such a heinous crime there is always probable cause, no matter the overwhelming evidence alleged crimes did not occur?

D. If officer fails to investigate potential exculpatory evidence, in 42 U.S.C. 1983 action, is probable cause negated, as matter of law?

E. When officer presenting case to prosecutor for decision of whether criminal complaint will be sought,
concealed exculpatory evidence, refused to scrutinize or investigate proffered exculpatory evidence, and attempted to bribe one into giving false inculpatory information; may a reasonable juror decide inculpatory information in
report is not to be trusted as accurate account of what was

[1] Unless otherwise noted, all references to probable cause herein regards probable cause to arrest.

told, by witnesses, to officer?

F. In determining probable cause, is hearsay admissible?

G. Are factors used to decide whether unavailable hearsay declarant is reasonably credible to allow hearsay evidence at trial used to decide probable cause?

H. Must exculpatory evidence be considered, and to what extent must investigating officer investigate such, in determining probable cause, particularly where it shows alleged crimes could not have occurred?

I. Do cases stating rule that when probable cause depends upon credibility of witnesses, it is particularly true such is for a jury to decide, mean it is mandatory jury decide issue?

J. Does alleged victim's assertion she was crime victim automatically provide probable cause; if, there is reason to believe she is lying, including opinions by other she is (1) habitual liar, and, (2) lying about allegations?

K. Is reasonable juror required, as matter of law, to discredit spouse, family member or friends exculpatory evidence, in determining probable cause?

L. May reasonable juror decide if inconsistent statements made by an alleged victim shows there was no probable cause; or, is it for the Court to decide inconsistences do not exist or are unimportant and do not negate probable cause?

M. May determination of probable cause include information, several years earlier, there were other alleged victims?

N. May speculation one had child from consensual sex with adult cousin, be considered relevant to whether there was probable cause as to alleged molestation crime?

3. ISSUES RELATING TO CIVIL RIGHTS ACTION FOR VIOLATION OF BRADY v. MARYLAND 373 U.S. 83, 83 S.Ct. 1194 (1963) AND ITS PROGENY.

O. Is there Brady violation if police conceal exculpatory evidence from prosecutor who is deciding whether arrest warrant/criminal complaint should issue; wherein, if prosecutor had such exculpatory evidence, she would not seek arrest warrant/criminal complaint?

P. Does form of Brady violation, involved herein, occur where evidence does not rise to guilt beyond a reasonable doubt, even with probable cause, if prosecutor's standard for seeking arrest warrant/criminal complaint is whether evidence shows, beyond a reasonable doubt, crime was committed?

4. ISSUES RELATING TO WHETHER SPOUSE HAS A CAUSE OF ACTION WHEN HUSBAND HAS A CAUSE OF ACTION FOR CIVIL RIGHTS VIOLATION.

Q. If one has cause of action for false arrest, malicious prosecution, or Brady violation, does spouse, especially one required to help pay for defense of criminal action, have a cause of action?

5. ISSUES RELATING TO STATUTE OF LIMITATIONS FOR CIVIL RIGHTS ACTION.

R. If tort claim is filed, is such operative in 42 U.S.C. 1983 action, even if, it would extend statute of limitations?

S. If filing valid tort claim is operative in 42 U.S.C. 1983 action, would invalid tort claim negate such from being operative?

6. ISSUES RELATING TO EQUAL PROTECTION.

T. If state court refuses to follow state law, to petitioners' detriment, is there an equal protection violation?

7. ISSUES RELATING TO ENTITY STATUS.

U. In California, for 42 U.S.C. 1983 purposes, is Sheriff Department, in investigating alleged crimes, an agency of the state, of the county, or both?

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Zaragozas petition for Writ of Certiorari to review decisions upon federal issues.

I. OPINION BELOW

Cal. Court of Appeal issued Opinion finding for respondent. (App. C)

II. JURISDICTIONAL STATEMENT.

Jurisdiction is by 28 U.S.C. 1257. Cal. Court of Appeal issued Opinion 8/15/01. 10/31/01 Cal. Supreme Court declined review. (App. C-D)

III. CONSTITUTION AND STATUTES.

Quoted in App. A are United States Constitution, Fourth Amendment, Fourteenth Amendment.

IV. STATEMENT OF THE CASE.

A. Procedural History.

Petitioners sued respondents for blowing statute of limitations on 42 U.S.C. 1983 case. Trial court held no limitations problem, petitioners would not have won such action. Ct. of App. affirmed. Sup. Ct. denied review.

B. Factual Summary.

Respondent attorneys were retained on federal civil rights claims for false arrest, federal malicious prosecution, etc. They allowed limitations to run.

Mr. Zaragoza falsely accused by daughter Jennifer of

molesting her, spanking with belt causing bruising. Long before allegedly molested, was having unprotected sex, taking illegal drugs, hanging with gangsters, doing poorly in school. Petitioners tried to stop her from destroying life, making her angry at petitioners.

Investigating officer was Wilson. Officers Price and Bates took witness statements. Cook was D.C.F.S. worker.

10/17/95 Mr. Zaragoza transferred Jennifer to different school to get her away from gangster friends. She disappeared; so, Mrs. Zaragoza called police, who found Jennifer. She then claimed father molested her. She was not put in protective custody; as, officer did not believe her.

10/19/95, after interviewed by Sheriff Jennifer lived with grandmother, never to return to petitioners' home.

Wilson was provided evidence showing Jennifer not credible. Wilson ignored such, refused to investigate exculpatory evidence given him, concealed exculpatory evidence from D.A. and magistrate, who decided arrest warrant would issue. This included evidence was impossible for 2 alleged molests to occur. Wilson tried to bribe witness to give inculpatory evidence. Had exculpatory evidence been given D.A. Mr. Zaragoza would not have been prosecuted.

11/28/95 arrest warrant/felony complaint issued. Mr. Zaragoza was arrested 11/29/95. Due to charges, he was fired. Before trial D.A. gave legal advise to, aided Mr. Zaragoza's ex-wife, obtaining family court order, limiting petitioners' familial rights with son. Purpose was to keep him from testifying, for defense. Mr. Zaragoza was tried, acquitted 12/10/96. Due to criminal proceedings petitioners suffered extreme financial, emotional damage.

1. Purported inculpatory evidence.

(a) Jennifer claimed was molested, (b) Mr. Zaragoza purportedly had consensual sex with adult cousin Perlita, by which baby was born[2], (c) Wilson purportedly told by Mr. Zaragoza's former stepdaughter, Theresa, was molested by Mr. Zaragoza many years earlier[3], (d) Wilson purportedly told by Mr. Zaragoza's daughter, Elayne, not surprised if Mr. Zaragoza molested Jennifer (e) Mr. Zaragoza spanked Jennifer with belt, causing bruising.[4]

2. 1ST ALLEGED MOLEST. a. Evidence could not happen. Jennifer said occurred when Pontings in Zaragozas' home for anniversary. Mrs. Zaragoza told Wilson, which Wilson was told Pontings could confirm, facts making impossible for it to occur. Obtaining warrant Wilson concealed such from D.A./magistrate, excluding from report.

i. Declaration of Mrs. Zaragoza.

> "told Wilson ... statements Jennifer ... made concerning the alleged molestations ... told him what really happened: A ... first incident, on May 5, 1995 Jennifer said I was at the bank ... Ponting were downstairs in our

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[2] Cousin denied sex with petitioner or having his baby.

[3] Was evidence available to Wilson to show she was lying.

[4] Wilson was told Elayne had reason to bad mouth father. She told Wilson not molested by Mr. Zaragoza. At prelim. hear. claimed she was. Thereafter admitted she lied, at prelim. hear.; as, did not like Jennifer getting all the attention.

home when it occurred ... said her father lifted her shirt and kissed her stomach. I told Wilson, Ray and I came home together ... I did not leave to go to the bank, or anywhere else, until later that evening when Ray, the Pontings and I left ... Ray and I got home from work, Jennifer was not even home. Ray and I showered and got dressed together. ... Pontings arrived. Jennifer was still not home. I was never gone from the home when the Pontings were there. While Ray, I and the Pontings were socializing before leaving for the evening, Jennifer came home and asked if she could spend the night with a friend. She was given permission and left. She did not come home again that evening. Jennifer was never alone with her father during the time she claims to have been molested"

ii. Ponting deposition confirming molest did not occur.

"was at the home of ... ("Ray") on May 5, 1995, celebrating my wedding anniversary. I arrived with my husband ...[5], 6:30 p.m. 3. When we arrived ... Jennifer ... not at home. Ray and his wife ... were home. Before my husband, I, Ray and Tammy left ... Jennifer arrived home, with a friend. Jennifer asked if she could spend the evening at her friends house. Jennifer was given permission to do so. She ... left. My husband, myself, Ray and Tammy then left ... only time Ray was out of

[5] He gave declaration with same content.

> my sight, before we left for the evening ... he went to the rest room. Jennifer has already left. From the time Jennifer came home to the time she left Ray and Jennifer were never gone from my presence at the same time. Ray did not molest Jennifer in my presence. It would have been impossible for Ray to have molested Jennifer without my seeing such. I was never contacted by ... Wilson or any other law enforcement officer, or person from the District Attorney's office, regarding Jennifer's allegations ... "

iii. Major inconsistencies.

Jennifer's friend, Ms. Buchen, told by Jennifer after petitioners' were downstairs arguing, Mr. Zaragoza came into Jennifer's room, apologized for arguing, molested her, which she told Wilson.[6] Wilson told by Buchen, Jennifer said happened in her room. She told Price happened in Mr. Zaragoza's room while he was getting ready for evening. Jennifer told Wilson Mrs. Zaragoza was at store.

Jennifer told Mrs. Zaragoza, Price, Wilson happened on said anniversary celebration, Bates in summer, could not remember dates/times. Two days later told Cook occurred about 5 p.m. Jennifer told Wilson happened during summer, after her birthday, 7/24, but before school year end. She knew anniversary was May, which she told Price. Jennifer

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[6] Buchen told by Jennifer, before school changed, was molested. Jennifer was already angry at petitioners for trying to prevent bad behavior, hated step-family, wanted Mrs. Zaragoza out of Jennifer's life. Change of school was last straw, for Jennifer, triggering charges to police, which Jennifer knew would get her out of home.

told Wilson all alleged molests happened during summer, before school year end, and after birthday. Was impossible for it to occur on said anniversary but after Jennifer's birthday. School ended 6/16. Was impossible for it to happen after birthday but before school year end. Wilson did not check school records.[7]

Buchen told by Jennifer hugged by Mr. Zaragoza, touched breasts through bra. Mrs. Zaragoza told by Jennifer father kissed stomach. Told Price father lifted shirt, kissed stomach. Told Bates father lifted shirt, bra, kissed stomach. Wilson told by Jennifer father pushed sweatshirt, bra up, kissed stomach.

3. 2ND ALLEGED MOLEST. a. Evidence could not happen.

i. Mrs. Zaragoza's declaration, school, employment records.

Wilson was told, by Mrs. Zaragoza, (1) Jennifer said occurred when Mr. Zaragoza home sick from work, (2) only times Mr. Zaragoza so home Jennifer at school. This could be proven by comparing Mr. Zaragoza's time cards with school records. Wilson refused to look at such. He omitted, from report, Mrs. Zaragoza's information.

"Jennifer said I was at work[8] and her father was home sick from work ... I told Wilson, on the only days Ray was home ill from work, Jennifer was in school."

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[7] Mrs. Zaragoza told Wilson Jennifer very aware of time of important events, noting such in organizer.

[8] Jennifer told Buchen Mrs. Zaragoza was home when all incidents occurred. Inconsistently, this is 2nd incident Jennifer told others Mrs. Zaragoza not home.

ii. Major inconsistencies. Buchen told by Jennifer was in her room, which Wilson was told. Officers were told by Jennifer was in father's room.

Jennifer told Price occurred 12-1 p.m., date unknown. Told Bates could not remember date, time. Two days later told Cook occurred about noon. Jennifer told Wilson was about 2 weeks after lst incident, which would have been (1) 5/19/95, by what she told Price, (2) depending upon which inconsistent statements were made to Wilson, (a) 8/95 in terms of being after birthday or (b) before 6/16/95 being school year end.

Jennifer told Buchen petitioners arguing.[9] Father came upstairs, apologized, hugged her, touched breasts through bra, which Wilson was told. Jennifer told Price father pulled her on top of him, rubbed thighs, upper part of groin. She told Bates Mr. Zaragoza put hand under shorts, rubbed vagina. Jennifer told Wilson Mr. Zaragoza pulled her on top of him, reached under pants, touched vagina.

3. 3RD ALLEGED MOLEST. a. Evidence did not occur. i. Declaration of Mrs. Zaragoza:

"Jennifer said she was in her room, I was asleep in my bedroom[10] and Ray was downstairs ... said Ray and I had

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[9] In declaration Mrs. Zaragoza said:

"May 5, 1995 through October 17, 1995 I was never at home while Ray was home from work sick. Also during that period I never, while Ray was home sick, got in an argument with him and left the home."

[10] Jeniffer realized story sounds truer if Mrs. Zaragoza asleep.

been arguing ... said Ray came upstairs and got on top of her and kissed her."

ii. Major inconsistencies.

Jennifer told Buchen petitioners downstairs arguing. Mr. Zaragoza came upstairs, apologized. Jennifer told Price awoke when Mr. Zaragoza got on top of her.[11] Cook told by Jennifer could hear appellants arguing when Mr. Zaragoza came to Jennifer's room. Wilson told by Jennifer was in bed sleeping, awakened when father got on top of her.

Price told by Jennifer occurred about 9/17/95. She told Bates could not remember date/time. Two days later told Cook occurred about 2 a.m. Jennifer told Wilson was about 2 weeks after 2nd incident, which, depending upon which of Jennifer's inconsistent statements used would be (1) if after said anniversary, about 6/2/95 (2) if after Jennifer's birthday, mid-August.

Jennifer told Buchen Mr. Zaragoza hugged Jennifer, touched breasts through bra, which Wilson was told. Told Price father got on top of her. Told Bates, Mr. Zaragoza held her down, started moving back and forth on top of her. Wilson told by Jennifer Mr. Zaragoza got on top of her, started grinding against her.

4. SPANKING CAUSING ALLEGED BRUISING.

a. Evidence showing did not happen. No mention to Price. Bates told by Jennifer spanked on buttocks causing bruising.

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[11] If so, could not have known Mr. Zaragoza downstairs and Mrs. Zaragoza asleep in bedroom, as told Mrs. Zaragoza.

She tried get Mr. Waite to see alleged bruising. He saw none. Sheriff failed to photograph/diagram/look at alleged bruises. Cook told by Jennifer no bruising.

i. Mr. Zaragoza's declaration.

"Wilson, he asked me if I spanked Jennifer with a belt buckle ... did not ask me ... whether such left any bruises. Jennifer was in my Karate class and within about 4 days of her claim ... was kicked in the buttocks during Karate class."

5. Matters relating to other accusers.

a. i. Mrs. Zaragoza declaration:

> "I told Wilson that Ray's ex-wives were mad at Ray and had a vendetta ... Jennifer and Elayne were mad at Ray. ... Theresa Ilagan's mother and Ray's ex-wife, Marianne Madison had previously threatened to kill Ray's parents. ... Marianne was a liar, a bigamist and an adulteress. ... a reason Marianne had it in for Ray was Marianne was afraid Ray would expose Marianne as a bigamist. ... when Elayne was living with us, and Ray and I would not allow her to sleep with her boyfriend, she left to go live with her mother. ... Elayne and Jennifer's mother had been involved in welfare fraud, was a drug addict and involved herself in abusive relationships where her boyfriends would beat her up. ... Jennifer and Elayne were aware of a rumor that Ray and his cousin ... had sex ... Ray was the father of Perlita's son. ... Elayne and Jennifer told me such was not true. "

ii. Mr. Zaragoza's declaration.

> "After Theresa Ilagan and her mother and I separated, Theresa said she wanted to come live with me.[12] ... Wilson on November 13, 1995 I told him ... Marianne's, father offered me $10,000.00 not to have anything to do with my son ... father had complained I had spoiled his family's blood line."

iii. Lourdes Zaragoza's declaration.

> "1988 Marianne Madison threatened to have me killed. At about the same time she told me Ray tried to molest her daughter, Theresa. Later, Marianne told me she lied about her comments Ray tried to molest Theresa. I was never interviewed by the Sheriff's Department regarding the molestation charges against Ray, for which he was arrested in 1995. If ... interviewed, I could have told ... about the death threat and the false allegations about Ray trying to molest Theresa. ... also told ... before Ray was arrested Theresa told me that (1) her mother physically abused Theresa by beating hew with different objects, (2) Theresa was afraid of her mother, and, (3) because Theresa was afraid of her mother, she would do whatever her mother wanted ..."

5. OTHER EXCULPATORY EVIDENCE.

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[12] Wilson-"Theresa said once her mom and the suspect were divorced she felt she didn't need to tell anyone because the suspect was no longer around." Wanting to live with Mr. Zaragoza belies story.

Note from Jennifer's friend asked if she was pregnant; to say her father did it. Others confirm Jennifer's gang involvement and criminal friends.

Her friends had evidence as to motive to lie, Wilson refused to investigate, being Jennifer (1) a habitual liar, (2) for long time involved in drugs, gangs, dangerous sex, (3) hated step family, (4) desperately wanted to move out of petitioners' home so could take drugs, flunk out of school, have sex without petitioners trying to stop her. She believed if did not live with petitioners could live with friend who would let her do such. Friends opined Jennifer lied about molest to get away from petitioners. Before Jennifer made allegations to police, told grand-mother as Jennifer was minor could make false allegations of being molested by parents; police would believe her.

Jennifer tacitly admitted lied about being molested, telling Hudson, whose 6 year old daughter she babysat, no problem with Mr. Zaragoza being alone with said daughter.

Many confirmed Mr. Zaragoza was upstanding, not abusive, parent. Was leader combatting gangs.[13]

V. REASONS FOR GRANTING THE WRIT.

If parent knows 15 year old daughter taking drugs, having unprotected sex, hanging with gangsters, flunking out of school, should parent ignore such, as parents of kids who kill classmates did; or, should parent try to stop daughter from destroying her life? If parent does try to save daughter,

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[13] Did not sit well with Jennifer's lover **COP KILLER BANDIT**.

and she retaliates by making false abuse allegations, is it permissible for parent to have life destroyed by corrupt law enforcement officers hiding exculpatory evidence?

Although this is malpractice case, there are many important federal issues to be resolved or clarified. Important societal issue is if there is always probable cause, in molest case, no matter the circumstances or charges falsity; or, should one falsely alleged to be molester have protection against having his, and families, life destroyed by having to defend against patently false and heinous charges?

Devereaux v. Abbey 263 F.3d 1070, 1083 (9th Cir. 2001) dissent noted witchhunts-child molestation.

> "Manufacturing false evidence and using the criminal law system to ruin the lives of innocent people is also a gravely serious wrong. The more terrible the crime and penalties, the more terrible is the wrong of 'framing' someone ... Our system of justice does not allow for the position taken by the notorious Crusader general, 'kill them all, God will know his own.'
>
> "**Witch hunts** ... regretted in retrospect, yet **abetted by the legal system** while they proceed. During the 1980's and 1990's, many towns in America were convulsed by accusations of mass sexual abuse of children ... replete with physically unlikely or **impossible events.**
>
> "**Common sense gets trampled ... creaky rigidity of our mechanisms for importing**

common sense into legal disputes sometimes keeps them from working.

"After ... medical report had proved that C.M.'s sex story could not be true, most sensible people would think of the Salem witch trials, and say to themselves 'here we go again.' The Salem witch trials were part of a mania ... ruined the lives of thousands of innocents ... accusations then, as now, often involved children and sex ... Salem witch trials, like the modern ones, based not on lynch mob action, but on formal trials ... educated people led the mania, instead of restraining it ..." (emphasis added)

VI. ARGUMENT.

A. FEDERAL MALICIOUS PROSECUTION.

1. There is federal malicious prosecution; elements not same as state malicious prosecution.

Federal circuits not in uniformity as to existence of federal malicious prosecution, and if so, its elements.

a. Does cause of action exist?

Authority split revolves around Albright v. Oliver, 510 U.S. 266 (1994). Circuits cannot decide if Albright allows federal malicious prosecution. Nine circuits say Albright does, upon Fourth Amendment. (Lambert v. Williams 223 F.3d 257, 261-62 (4th Cir. 2000).) Gordon v. Hansen, 168 F.3d 1109 (8th Cir. 1999) and Frantz v. Village of Bradford 245 F.3d 869 (6th Cir. 2001) it does not. Frantz

noted lack of uniformity problem.

"courts have struggled with malicious prosecution ... different conclusions ... Tenth Circuit ... 'Albright **muddied the waters** rather than clarified them,' Taylor v. Meacham, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996) ... 'the extent to which ... malicious prosecution is actionable under 1983 ... **'embarrassing diversity** of judicial opinion.'... " (emp. add.)

b. If exists, what are elements?

Russell v. Smith 68 F.3d 33, 36 (2d Cir. 1995) says federal malicious prosecution is same as state law. Contrary, Barlow v. Ground 943 F.2d 1132, 1136 (9th Cir. 1991) notes reckless disregard for accused enough, Brooks v. City of Winston-Salem 85 F.2d 178, 184 (4th Cir. 1996) says malice not part of federal malicious prosecution, Borunda v. Richmond 885 F.2d 1384, 1391 (9th Cir. 1988), Caballero v. Concord 956 F.2d 204, 206 (9th Cir. 1992) held negligence enough. Whether false arrest or malicious prosecution, unlawful seizure involved, negligence enough. (Stachniak v. Hayes 989 F.2d 914, 925-926 (7th Cir. 1993), Hudson v. New York City 271 F.3d 62 (2d Cir. 2001).)

B. ISSUES RELATING TO PROBABLE CAUSE.

1. If officer fails to investigate exculpatory evidence, no probable cause as matter of law.

Lack of uniformity as to effect, as relates to probable cause, of officer failure to do proper investigation in obtaining arrest warrant. Some circuits hold matter which should have been presented to magistrate in obtaining warrant is factored into evidence with probable cause being retested with omitted information. (Smith v. Edwards 175

F.3d 99, 105 (2d Cir. 1999).)

However, Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 925 (9th Cir. 2001) held if officer fails to investigate exculpatory evidence, no probable cause for 42 U.S.C. 1983 cases, as matter of law, with no retesting.

"If Officers ... did not independently investigate Ruiz's claim of battery, they did not have probable cause to arrest ..."

If Arpin is correct, there are issues does not directly address, but by inference appear to apply. Certiorari is appropriate to resolve such in one fell swoop, e.g. if Arpin applies where (1) arrest warrant issued upon concealment of evidence, (2) police refuse to review exculpatory documents, where some, not all, witnesses with exculpatory evidence not interviewed, (3) witnesses with purportedly inculpatory evidence are interviewed, and/or (4) witness with exculpatory evidence is interviewed but, by failing to put evidence in report, is concealed from prosecutor/magistrate.

2. It is for jury to decide if probable cause existed.

Lack of uniformity, and/or ambiguity, as to whether jury decides probable cause. Opinion rules court may, and did, decide credibility, and determine if probable cause existed. Opinion held it could, and did, decide if were material inconsistencies without allowing jury to decide such. Opinion decided all giving inculpatory evidence credible, all giving exculpatory evidence not credible.[14]

[14] Issue arises whether jury could decide inculpatory information in Wilson's report, who concealed exculpatory evidence, was really given. DeLoach v. Bevers 922 F.2d 618, 620-623 (10th Cir. 1990) and Hindman v. City of Paris, Tex. 746 F.2d 1063, 1067 (5th Cir. 1984) ruled is for jury to decide investigating officer credibility.

a. Rule that when probable cause depends upon witness credibility, it is particularly true probable cause is for jury to decide; means, it is mandatory jury decide issue.

Unresolved is if when witness credibility involved, is it mandatory that jury decide probable cause. If exculpatory evidence used, 2 of 3 alleged molests, and spanking charge could not happen.[15] Opinion ruled it could decide credibility, discredit exculpatory evidence, take issue from jury.

"probable cause in a section 1983 damage suit is one for the jury ... particularly true where the probable cause determination rests on **credibility** ..." (Merkle v. Upper Dublin Sch. Dist. 211 F.3d 782, 788 (3d Cir. 2000)(Jennings v. McCormick 154 F.3d 542, 546 (5th Cir. 1998).)(emp. add.)

Frantz v. Village of Bradford, supra, 245 F.3d at p. 872, in quoting the District Court, appears to rule Court may not make credibility determinations.

"'Court may not make credibility determinations ... motion for summary judgment or weigh conflicting evidence.'"

Merkle, Frantz and Jennings apparently hold if credibility involved, jury must decide probable cause issue. However, upon Opinion's failure to recognize such, principle is apparently unclear. Also cases exist saying jury not allowed to decide alleged victim not credible. Certiorari can resolve

[15] If jury decides 1 event could not happen, could find deficient credibility, as to all charges, negating probable cause.

which is correct, and when.

Citing Easton v. City of Boulder 776 F.2d 1441 (10th Cir. 1985) Opinion held it may ignore Jennifer's inconsistencies. Reliance on Easton, aberration not uniform with federal circuits, is misplaced.[16]. Delmonte Dunes at Monterey v. City of Monterey 95 F.3d 1422, 1426-1427 (9th Cir 1996), Hobbs v. Lockhart 46 F.3d 864, 868 (8th Cir. 1995) hold there is right to jury trial. Patzig v. O'Neil 577 F.2d 841, 848-849 (3d Cir. 1978) Moore v. Marketplace Restaur. 754 F.2d 1336, 1347 (7th Cir. 1985) McKenzie v. Lamb 738 F.2d 1005, 1008 (9th Cir. 1984) Liston v. County of Riverside 120 F.3d 965 (9th Cir. 1977) hold jury's decision whether probable cause exists.

3. Alleged victim's assertion she was crime victim does not automatically provide probable cause; if, there is reason to believe she is lying, including opinions by other she is liar.

Opinion looks only to Jennifer's claim she was victim, without regard to stories details, consideration of evidence showing she was not credible and exculpatory evidence. Opinion, in essence, holds alleged victim is automatically credible. Victim's alleged story does not always establish probable cause.

a. Alleged victim not automatically credible.

Probable cause decided upon totality of circumstances, (Illinois v Gates 462 U.S. 213 (1983),

[16] It is also distinguishable. It involved young children with no motive to lie. This case involves 15 year old with such motive. Even in Easton, jury should have been allowed to decide if innocent inconsistencies negated probable cause.

requiring investigation of alleged victim if reason to doubt credibility, before probable cause is reached. (Merriman v. Walton 856 F.3d 1333 (9th Cir. 1988); Bruning v. Pixler 949 F.2d 352, 358 (10th Cir. 1991); Fuller v. M.G. Jewelry 950 F.2d 1437, 1444 (9th Cir. 1991). Hutchinson v. Grant 796 F.2d 288 (9th Cir. 1986) held improper to arrest when officer is aware of potential exculpatory information.

Officer investigating alleged crime must, for probable cause, investigate evidence of innocence. (Kuehl v. Burtis 173 F.3d 646, 650-651 (8th Cir. 1999).) If reason to doubt alleged victim credibility, probable cause is not reached until exculpatory evidence investigated, to see if alleged victim is credible. (Moore v. Marketplace Restaur., supra, 754 F.2d 1336; Hebron v. Touhy 18 F.3d 421 (7th Cir. 1994); Liston v. County of Riverside, supra, 120 F.3d at p. 975; Bruning v. Pixler, supra, 949 F.2d 357-358.)

In looking to omissions negating probable cause, look to evidence of which officer has notice and would have been obtained if investigated. (Peterson v. City of Plymouth 60 F.3d 469, 476-477 (8th Cir. 1995).) Merriman v. Walton, supra, 856 F.3d p. 1335 ruling officer did not do sufficient investigation noted:

"A reasonable police officer would have made further inquiry before affecting a warrantless arrest."

Opinion causes confusion holding, victim automatically supplies probable cause.[17]

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[17] With no real scrutiny of evidence or analysis, Opinion reaches patently incorrect conclusion, unsupported by facts, Jennifer gave consistent versions concerning allegations, by ignoring factual details. Her stories were highly inconsistent on material points. Even if each of her stories was consistent, that there is evidence they could not have

b. Standards for determining hearsay trustworthiness at trial used for deciding credibility.

Unanswered issue, whether standards related to witness trustworthiness to have hearsay admitted at trial, apply to probable cause credibility. Where prosecution seeks to introduce hearsay, with no ability to cross-examine, court must analyze trustworthiness upon totality of circumstances, based upon circumstances of allegation, and, declarant's credibility. (Idaho v Wright 497 U.S. 805, 815, 819 (1990).) Idaho notes, while not exclusive, 4 factors involving credibility in child molestation cases. (Id. 821-822.)

"factors ... whether hearsay statements made by a child witness in child sexual abuse cases are reliable ... spontaneity and consistent repetition ... mental state of the declarant ... use of terminology unexpected of a child of similar age and lack of motive to fabricate."

Jennifer failed miserably in all respects. Statements were not spontaneous, were major inconsistencies. Most allegations could not have happened. Mental state was anger, retaliatory, vindictive. Not only was terminology not unexpected for her age; but, friends said she loved to talk about her sexual exploits in detail. She had motive to lie.

Within Idaho purview is unanswered question, if one who knows alleged victim can give opinion whether credible? Ellison v. Sachs 583 F.Supp 1241, 1249 (D.Md. 1984), aff'd 769 F.2d 955, 957 (4th Cir. 1985) held observations by one who knows alleged victim considered.

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happened sufficient to allow jury to decide probable cause issue.

Gregory v. State of N.C. 900 F.3d 705 (4th Cir. 1990) notes:

"familiar as she was with LaTonya's personality read nothing in her manner to lend credence to her remark." (Id. 709??.)

Opinion wrongly says no foundation for opinions expressed as to Jennifer's credibility. Webb v. Lewis 44 F.3d 1387, 1392-1393 (9th Cir. 1994) appears to hold those who know alleged victim may render opinions of truthfulness, whether allegations to be believed. Recourse to evidence, besides statements themselves, may be used to show alleged victim not trustworthy. (Id. 1292.)

Assuming issues may have been decided, Opinion shows are ambiguous, which this Court can correct.

4. Reasonable juror not required to discredit family member or friends exculpatory evidence.

Opinion, ignoring Mr. Zaragoza's friends and relatives exculpatory evidence, holds, such evidence is not considered, or considered credible. Jones v. Chicago 856 F.2d 985, 990 (7th Cir. 1988) appears to hold such information is considered.

"report was full of falsehoods, ... father had not seen him on the morning ... father had told the investigating officers that he had seen George ... that morning ..."

Certiorari is appropriate for direct ruling upon issue; particularly since, Opinion shows law on issue is unclear.

5. Probable cause evidence may not include information, several years stale, was other alleged victims.

Opinion impermissibly looked to alleged victim of similar alleged crime several years earlier. Jaben v. U.S. 381 U.S. 214, 223 (1965) held as to support probable cause:

"Information in a complaint ... two categories: (1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates to the source of the incriminating information.'"

People v. Jones (1954) 42 Cal.2d 219, 226 noted "direct evidence" is alleged victim and accused's information; others indirect. Under Jaben since supposed evidence from Theresa/Elayne/Perlita/ex-wives does not directly indicate alleged crimes committed or relate to source of incriminating information, does not support probable cause. Certiorari will clarify Jaben ruled, for probable cause, evidence must directly implicate accused.

6. In determining probable cause, hearsay is admissible.

Would hearsay be inadmissible, in federal court, had underlying action been filed? Opinion says exculpatory hearsay inadmissible, inculpatory admissible. Out of court statements regarding probable cause are admissible. (Franks v. Delaware 438 U.S. 154 (1978); U.S. v. Castillo 866 F.2d 1071 (9th Cir. 1988).) Certiorari can clarify admissibility.

7. Speculation one had child from consensual sex with adult cousin, not relevant to probable cause.

Opinion deciding reasonable juror could not find no probable cause considered irrelevant speculation, rumor Mr. Zaragoza was adult cousin's child's father despite report stating cousin denied having sex with Mr. Zaragoza. Nor did cousin say Mr. Zaragoza was father. Opinion creates

confusion as to what can be considered as to probable cause.

C. BRADY VIOLATION ISSUES.

1. Brady violation exists if police fail to give prosecutor, for use in deciding whether arrest warrant should issue, exculpatory evidence.

Brady v. Maryland 373 U.S. 83 (1963) rules if prosecutor withholds exculpatory evidence from defense, constitutional violation exists. Usually occurs when evidence is found after guilty verdict

Variant Brady violation, from progeny, is when police keep exculpatory evidence from prosecutor deciding if to prosecute. If said evidence would cause prosecutor to refuse to prosecute, violation occurs.

Opinion held Brady violation only occurs if prosecutor fails to give defense evidence.[18] It is not in uniformity with courts or reflects unresolved issue of if Brady violation occurs when police fail to give exculpatory evidence to prosecutor for deciding whether to prosecute.

Jones v. Chicago, supra, 856 F.2d 985, holds Brady violation occurs if police keep Brady material, from prosecutor, deciding whether to prosecute; as, it could influence prosecutor not to.

> "jury could find that the defendants systematically concealed from the prosecutors ... facts highly material to -- that is, facts

[18] No matter how named, whether Brady, or progeny, claim exists.

likely to influence -- the decision whether to prosecute Jones ... If the prosecutors had known of Laverty's evidence ... **might never have been charged in the first place** if the prosecutors had known the facts militating against Jones's guilt ... **jury was entitled to find** that had it **not been for the misconduct of the defendants, Jones would neither have been arrested nor charged.**

"police files **withheld** from the state's attorney .. unavailable as a source of **exculpatory information that might induce him not to prosecute ... information undermining the credibility of a government witness is within the scope of Brady's rule** ... records ... concealed from prosecutors ... cannot be tolerated.

"clandestine character of ... files played a role in Jones's misfortunes. If the state's attorney had access to them, he would have discovered memos ... would have given any prosecutor pause." (Id. 995.)(emphasis added)(See also Walker v. City of New York 974 F.2d 293, 299 (2d Cir. 1992) and DeLoach v. Bevers, supra, 922 F.2d at p. 621.)

Opinion claims Jones not Brady violation. Newsome v. McCabe 256 F.3d 747, 752 (7th Cir. 2001), says Jones held Brady violation occurs if police withhold exculpatory evidence from prosecutor deciding if to prosecute.

"The Brady principle was announced in 1963, and we applied it in Jones to affirm a

> **hefty award of damages against officers who withheld exculpatory information** ... If Newsome can prove what he alleges, then **under the approach of Brady and Jones v. Chicago** he will establish a violation of the due process clause ..." (emphasis added.)

Wilson v. Lawrence County 260 F.3d 946, 957 (8th Cir. 2001) held if police withhold such evidence from prosecutor, Brady violation occurs.

> "officers ... responsibility ... conduct ... investigations ... fairly as illustrated by the Brady line ... faithful to the overriding interest that 'justice shall be done.' ... Agurs, 427 U.S. 97, 110-11 ... ... Bagley, 473 U.S. 667 ... Youngblood, 488 U.S. at 54-55 (evaluating whether Brady applied where officers ... lost evidence) ... no countervailing equally important governmental interest that would excuse the appellants from fulfilling their responsibility to investigate these leads ... "

Are 7th, 8th, 10th Circuits anomaly? Is Opinion wrong?

2. Brady violation occurs, with probable cause, if prosecutor's standard for prosecuting is reasonable doubt.

Opinion ruled as was probable cause, no Brady violation. However, configuration of Brady violation herein is, would prosecutor have prosecuted if had exculpatory evidence which should have been provided? Thus, standard should not be probable cause, but, standard used by prosecutor; e.g., if would not have prosecuted unless evidence showed guilt beyond a reasonable doubt, Mr.

Zaragoza would not have been prosecuted, even assuming arguendo, was probable cause.[19] There is proximate cause between misconduct and injury. Probable cause irrelevant.

This is issue of first impression. Jones v. Chicago, supra, 856 F.2d at p. 995 notes:

"jury was entitled to find that had it not been for the misconduct ... would neither have been arrested nor charged."

Chimel v. California 395 U.S. 752, 776 fn. 12 (1969) held Fourth Amendment protection goes beyond keeping matters seized without probable cause from put into evidence. Unreasonable seizure may happen with probable cause. (Hall v. Ochs 817 F.2d 920, 923 (1st Cir. 1987); Webster v. Gibson 913 F.2d 510, 513 (8th Cir. 1990).) Pennsylvania v. Ritchie, 480 U.S.39, 60 (1987), U.S. v. Bagley, 473 U.S. 667, 676 (1985) note Brady violation occurs if there is reasonable probability disclosure would have resulted in proceeding having different result. (Id. 675, 682.)

D. ISSUES RELATING TO SPOUSES CLAIMS.

1. If one has civil rights claim spouse, especially one required to pay for criminal action defense, has claim?

Lack of uniformity. Lee v. County of Los Angeles 240 F.3d 754 (9th Cir. 2001), Byrd v. Guess 137 F.3d 1126, 1133-1134 (9th Cir. 1998),(Smoot v. City of Placentia 950 F.Supp. 282 (C.D. Cal. 1997) Estate of Macias v. IHDE 219

[19] D.D.A. deposed, she follows L.A.D.A. policy using reasonable doubt standard in deciding if to prosecute.

F.3d 1018 (9th Cir. 2000) hold family have federal loss of consortium. Even if one is not target of government action, has claim if suffered concrete, particularized injury; is causal connection between injury and conduct and injury is likely redressed by favorable decision. (Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-562 (1992).) Wolfe v. Thalar 525 F.2d 977 (5th Cir.), Mattis v. Schnarr 502 F.2d 588 (8th Cir. 1974), Clark v. Lutcher 436 F.Supp. 1266, 1269 (1977) held if family member of one whose rights are violated incurs money loss, standing to sue. Mrs. Zaragoza spent money for Mr. Zaragoza's defense.

Contrary, Coon v. Ledbetter 780 F.2d 1158 (5th Cir. 1986) holds no family member standing. Harpole v. Arkansas Dep't. of Human Services 820 F.3d 923, 928 (8th Cir. 1982), Archeleta v. McShane 897 F.2d 495 (10th Cir. 1990) and Ortiz v. Burgas 807 F.2d 6 (1st Cir. 1986) hold no federal loss of consortium.

D. STATUTE OF LIMITATIONS.

Trial court held state tort claim laws extended statute of limitations. If Certiorari is granted upon other grounds, with petitioners successful, issue will have to be addressed.

1. If tort claim filed, such is not operative in 42 U.S.C. 1983 action, even if, it would extend statute of limitations.

Silva v. Crain 169 F.3d 608 (9th Cir. 1999) held tort claim does not apply even if extends statute of limitations. Trial court wrongly ruled claim statutes apply. If applied, herein, would extinguish claims, not give longer limitation period; as, claims statutes were not complied with.

E. EQUAL PROTECTION.

1. Rulings depriving petitioners benefit of legal standards is equal rights violation.

There were several instances wherein petitioners denied benefit of California law. When judicial system establishes procedures, is equal protection right to application of laws. In Williams v. Oklahoma, 395 U.S. 458 (1969) one was given right to appeal. Having been given, was taken away by denying person means to appeal. Williams ruled person could not be given right then have it taken away, without violating equal protection. This case can clarify under what circumstances Williams applies.

a. Allowing summary judgment upon causes of action not addressed in summary judgment motion.

California law requires, for summary judgment, defendants negate every potential theory of recovery plaintiff may have. If defendants have not met burden, plaintiff not required to provide any evidence, or opposition, to motion. (Prilliman v. United Air Lines (1997) 53 Cal.App.4th 935) To petitioners' detriment, Opinion refused to apply such standards. There were state law causes of action, and underlying federal claims lost, not addressed in respondents' summary judgment motion.

b. Failure to analyze case. Complaint stated claim Davis did not analyze underlying case, for which he was paid. Not raised in summary judgment, yet, such granted.

c. Cromers' interference in petitioners' familial rights. Potential underlying action, Cromer giving legal advise to, aiding, Mr. Zaragoza's ex-wife in interfering in petitioners' relation with son. Although not addressed by respondents'

summary judgment motions, and petitioners brought theories to court's attention, summary judgment granted.

d. Contesting Brady for 1st time on appeal.

At summary judgment, respondents' did not contest Brady claim. They merely said they not responsible. California does not allow party to raise new issue for first time on appeal, where as herein, fact issue involved.

e. Basing probable cause decision on facts not in summary judgment motion.

Law requires one seeking summary judgment to set forth all facts in statement of facts. (City of S. Pasadena v. Dept. of Trans. (1994) 29 Cal.App.4th 1280, 1294-1295) Only facts in support of respondents' motion was Jennifer claimed was molested, bruised by spanking. Opinion denied petitioners benefit of said law, going beyond alleged facts in respondents' statement of facts.

f. Ruling some of petitioner's evidence not admissible.

If no request for ruling on evidentiary objections is made at hearing, objections waived; and, evidence admitted. (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 667 fn.1.) Respondents did not seek or receive any such rulings. All exculpatory evidence should have been admitted. Yet, petitioner's were not given benefit of such law; as, Opinion claimed inadmissibility of some evidence.[20]

[20] Justice Turner, who joined in Opinion, about same time wrote article stating rule. Herein, he ruled contrary to what he wrote in article. (Journal of the Consumer Attorneys Association of Los Angeles, Advocate, July/August issue, p. 12.)

g. Refusal to recognize Cook's evidence.

If there is evidence which one cannot provide at summary judgment, court is advised, court must deny motion or continue such while evidence is obtained. (Code of Civil Procedure section 437c (h).) Petitioner's needed to, and in process of, obtaining Juvenile Court permission to use Cook's information. Trial court was twice told such; however, could not be obtained by summary judgment hearing date. Trial court orally said there were facts from which jury could decide petitioners would have won civil rights suit. In written order, trial court changed mind. Cook's evidence presented in Motion for New Trial. Petitioners were not given benefit of deny or continue rule.

F. SHERIFF DEPARTMENT STATUS.

Is Sheriff, in investigating alleged crimes, acting as county agency, state agency, or both? California State Association of Counties will seek Certiorari on issue. (L.A. Daily Journal, 1/2/02.)

Pitts v. County of Kern (1998) 17 Cal.4th 340 ruled D.A, prosecuting crimes are state agencies; although, employed by county; as, Attorney General has control and supervision. Same factors in Pitts inhere in Sheriff investigating crime. Brewster v. Shasta County, 01-11518 (9th Cir. 2001), Bishop v. Paiute 01-15007 (9th Cir.2002) held Sheriff is county agent.

Sheriff does not act solely for state or county. It is dual agent. In Greenaway v. W.C.A.B. (1969) 269 Cal.App.2d 49, 54 employee was dual official of state, county **carrying out**, "necessary state and **county duties**."

Since Sheriff acts for county and state in investigating alleged crimes, it is dual agent.

G. CONCLUSION.

Petitioners were victimized by government, respondents. So too was Jennifer. Had Mr. Zaragoza not been prosecuted, he may have been able to help Jennifer. Instead, she went to live with he drug addict mother, became a teen mother and dropped out of high school. Court has opportunity to not only right wrongs; but, as it must for it to grant Certiorari, settle important federal issues.

Dated: January 16, 2002

LAW OFFICES KENNETH M. STERN

_____

KENNETH M. STERN FOR PETITIONERS

APPENDIX A

1. United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. United States Constitution, Fourteenth Amendment:

"Section 1... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

ORIGINAL FILED
APR 28 2000
LOS ANGELES
SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSEPH RAYMOND ZARAGOZA, TAMMY ZARAGOZA, Plaintiffs, vs. DEFENDANTS' DANIEL G. DAVIS; MICHAEL D. DEMPSEY; DEMPSEY & JOHNSON P.C., and DOES 1 through 20, inclusive, Defendants.	) Case BC 202358) Assigned to I/C) Judge Alan G.) Buckner, Dept.) 14) ORDER GRANTING))) MOTIONS FOR)) SUMMARY) JUDGMENT AND) DENYING) PLAINTIFFS') MOTION FOR) SUMMARY) ADJUDICATION OF) ISSUES

Date: March 23, 2000
Time: 9:00 a.m.
Dept.: 14

The (1) motion for summary judgment of defendants

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

COURT OF APPEAL - SECOND DIST.
FILED AUG. 15, 2001
Joseph A. Lane Clerk, Deputy Clerk

JOSEPH R. ZARAGOZA et al., B142854
Plaintiff and Appellants, (Super. Ct. No. BC202358)

v.

DANIEL G. DAVIS et. al.,
Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan G. Buckner, Judge. Affirmed.

Law Offices of Kenneth M. Stern and Kenneth M. Stern for Plaintiffs and Appellants.

Greines, Martin, Stein & Richland, Rex S. Heinke, and Douglas S. Irwin for Defendant and Respondent Daniel G. Davis.

Lewis, D'Amato, Brisbois & Bisgaard, Mary Whitaker, and Thomas G Oesterreich for Defendants and Respondents Michael D. Dempsey and Dempsey and Johnson P.C.

Joseph Zaragoza and Tammy Zaragoza, husband and wife, appeal the dismissal of their lawsuit against respondents

MICHAEL D. DEMPSEY and DEMPSEY & JOHNSON P.C. ("Dempsey"); (2) motion for summary judgment or, in the alternative, summary adjudication of issues of defendant DANIEL G. DAVIS ("Davis"); and (3) motion for summary adjudication of issues of plaintiffs JOSEPH RAYMOND ZARAGOZA and TAMMY ZARAGOZA ("plaintiffs" or "Mr. Zaragoza" and "Mrs. Zaragoza") came on regularly for hearing in Department 14 of the above-entitled Court, the Honorable Alan G. Buckner presiding, on March 23, 2000.

...

After considering the written submissions of the parties, argument of counsel, and all other matters presented to the Court, IT IS ORDERED as follows:

1. Dempsey's and Davis' motions for summary judgment are GRANTED, on the grounds that plaintiffs had no probable collectible claim against any governmental entity or employee arising out of the underlying arrest and/or criminal prosecution of Mr. Zaragoza, in that the Los Angeles county Sheriff's Department and the Los Angeles County District Attorney;s Office had probable cause to arrest and prosecute Mr. Zaragoza; and that the statute of limitations on any action plaintiffs may have filed in connection with the underlying arrest and/or criminal prosecution of Mr. Zaragoza did not run until at least December 10, 1998.

Michael D. Dempsey, Dempsey & Johnson (collectively, "Dempsey") and Daniel G. Davis, after respondents" motion for summary judgment were granted. We affirm.

Summary

In October of 1995, Mr. Zaragoza's 14-year-old daughter Jennifer told Los Angeles County Sheriff's deputies that her father had sexually molested her on three occasions. After and investigation, the District Attorney's Office filed a complain charging Mr. Zaragoza with three counts of Penal Code section 288, subdivision (c) and a misdemeanor violation of Penal Code section 273a, subdivision (b). On November 28, 1995, a warrant was issued for his arrest. At a preliminary hearing on January 31, 1996, both Jennifer and her older sister Elayne testified that they had been molested by Mr. Zaragoza. He was held to answer on all charges. On December 10, 1996, a jury acquitted him of the misdemeanor and one of the felony counts. The jury could not reach a verdict on the other charges, which were dismissed.

Appellants wished to bring a lawsuit in federal court for violation of civil rights, against Los Angeles County employees. They sought representation from respondents. No civil rights suit was ever filed.

In December of 1998, appellants filed this lawsuit, contending that respondents had agreed to represent them in a federal civil rights action, had failed to do so, and had failed to advise them of the applicable statute of limitations. They brought causes of action for breach of oral and written contact, negligence, conspiracy, intentional infliction of emotional distress, and loss of consortium.

By time of summary judgment, appellants' theory

was that they had meritorious claims against Detective Michael Wilson of the Los Angeles County Sheriff's Office, the detective who investigated the case and signed the warrant application which formed part of the complaint, and his supervisors, Sergeant Kevin Carney. Substantively, they contended that their claims were for violation of 42 United Stated Code section 1983 ("section 1983") based on arrest without probable cause and on violation of Brady v. Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and for malicious prosecution.

Respondents moved separately for summary judgment. Each raised as one ground that appellants had no provable, collectible claim, since there was probable cause for Mr. Zaragoza's arrest. The trial court granted the motions on that ground. Appellants' motion for new trial was denied.

Facts[1]

Respondents evidence

At summary judgment, on the issue of probable cause, respondents relied on the undisputed evidence that an arrest warrant was issued by a judge and that Mr. Zaragoza was held to answer at the preliminary hearing. They also proffered three police reports. (The warrant application indicates that law enforcement reports were attached.)

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[1] Appellants' motion for judicial notice and to submit new evidence on appeal is denied. The matters for which notice are sought are not the proper subject of judicial notice.(Evid. Code §451.) Dempsey's motion for sanctions is denied.

The reports were:

– An October 17, 1995, report which states that on that date, Deputy Ken Price responded to Mr. Zaragoza's missing person report. Mr. Zaragoza told Deputy Price that Jennifer had made accusations of sexual abuse against him. Jennifer told Deputy Price that she had been molested three times. The report includes Jennifer's description of each incident. Briefly, in the first incident, Mr. Zaragoza lifted Jennifer's shirt and kissed her stomach. This took place in May, on the wedding anniversary of family friends, Steven and Margaret Ponting. Jennifer said that the second incident took place about two months prior to the report. Her father pulled her on top of him in bed and rubbed her groin under her clothes. The third incident took place about six weeks before the report. Her father got on top her while she was sleeping and told her that if she were not his daughter he would make love to her.

Jennifer told Deputy Price that she had told a friend, Charity Buchen, about the molestation and had also told her stepmother. Deputy Price interviewed both those witnesses. Charity told him that in September, Jennifer had said that she had been molested by her father. Charity's account of Jennifer description of the molestations was similar to Jennifer's description to Deputy Price.

Mrs. Zaragoza told Deputy Price that Jennifer had said that she had molested three times. Mrs. Zaragoza repeated Jennifer's descriptions, which were again similar to the descriptions Jennifer gave Deputy Price. Mrs. Zaragoza said that she believed Jennifer might be inventing the incidents because she was angry at her father for transferring her to a new high school.

Deputy Price asked Mr. Zaragoza about the school transfer. He said that he had arranged the transfer because Jennifer's grades slipped and her friends were a bad influence. He told Jennifer about the transfer on October 17. She became verbally abusive and disrespectful. He hit her with a belt and she left the house without permission.

- An October 1995, report prepared after tow other deputy sheriffs, Bates and Kelleher, responded to a child abuse call from the Zaragoza home.[2] Their report states that Jennifer told them that on October 17, her father hit her on the hip with a belt, and that he had molested her three times over the summer. The report includes descriptions of each molestation which are similar to the earlier report, although these descriptions are much briefer.

This report includes interviews with two additional witnesses. Matthew Waite said that on October 17, he observed bruises on Jennifer's hip. Waite told the deputies that Jennifer had been having a difficult time with her father since he told her that she would have to transfer to a new high school.

- A November 27 supplementary report by the Juvenile Investigations Division, Child Abuse detail, prepared by Detective Wilson, who had by then been assigned to the case. He interviewed Jennifer, her sister Elayne, Marianne Madison (Mr. Zaragoza's ex-wife, Madison's daughters Eileen and Teresa Ilagan, Charity Buchen, and Mr. Zaragoza.

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[2] After this call, Jennifer was taken into protective custody and was released to the Department of Children and Family Services.

Jennifer described three incidents. Again, these descriptions were similar to her earlier descriptions. She also told Detective Wilson that Mr. Zaragoza had molested her cousin, Perlita Manning, who had his baby about five years ago. Charity Buchen's report was consistent with her earlier statement to Deputy Price.

Elayne Zaragoza said that she had not been molested but that she was not surprised by her sister's allegations, since Mr. Zaragoza had molested Perlita Manning.

Marianne Madison said that she had divorced Mr. Zaragoza because of his affair with Perlita Manning. According to Madison, Manning lived with the family beginning when she was 14 years old. In August of 1989, when Manning was 18, Madison came back from a trip and learned of the affair from her daughter Eileen Ilagan and from Jennifer. Eileen Ilagan confirmed Madison's account, and also told Detective Wilson that she had observed Mr. Zaragoza and Perlita Manning "in bed having sex."

In subsequent interviews, Madison told Detective Wilson that her daughter Teresa Ilagan had disclosed that she too had been molested by Mr. Zaragoza. Detective Wilson spoke to Teresa, who said she was 12 years old when Mr. Zaragoza molested her. Teresa described three incidents in some detail.

Madison told Detective Wilson about a call from Mrs. Zaragoza, in which Mrs. Zaragoza said that if Madison wanted continued child support, she should stop saying things about Mr. Zaragoza. Madison also reported that Mrs. Zaragoza had telephoned Teresa and called her a

liar.

Detective Wilson called Perlita Manning and asked about her son's parentage. Manning told Detective Wilson that her husband was not the boy's father and that she would not say who the father was. Detective Wilson asked whether Mr. Zaragoza was the father. Manning hesitated for a few seconds, then said that she could not tell whether he was the father. She then denied having had a sexual relationship with Mr. Zaragoza.

Mr. Zaragoza told Detective Wilson that Jennifer had been an unmanageable child for the last two and half years. She had been involved with drugs and gangs and had cut classes. According to Mr. Zaragoza, Jennifer made up the allegations of molestation after he transferred her to a new high school, in an attempt to correct her behavior.

Appellant's evidence

Appellants proposed as undisputed that there was no probable cause for Mr. Zaragoza's arrest, if the information which should have been (but was not) presented to the District Attorney or magistrate was considered. In support, they cited Mrs. Zaragoza's declaration and the exhibits attached to both Mr. and Mrs. Zaragoza's declarations and the declaration of counsel.

Mrs. Zaragoza declared that on November 13, 1995, she told Detective Wilson that she had documents which would show that Mr. Zaragoza was innocent. Detective Wilson said that he was not interested in the documents, since his job was to put together a case against Mr. Zaragoza. Mrs. Zaragoza repeated her account of Jennifer's description of the molestations, and gave her own account.

For instance, Mrs. Zaragoza declared that she told Detective Wilson that Jennifer had said that the second incident took place when Mrs. Zaragoza was at work and Mr. Zaragoza was home sick, but that in fact Jennifer was in school on the only days Mr. Zaragoza was home from work.

Mrs. Zaragoza also declared that she had told Detective Wilson that there were inconsistencies between what Jennifer told her and what Jennifer told the DCFS social worker, that Jennifer had a friend who had given her a note that said that she should say that her father had gotten her pregnant; that Marianne Madison was a liar, a bigamist, and an adulteress and had vendetta against Mr. Zaragoza; that Jennifer and Elayne were mad at their father; that Jennifer and Elayne's mother was a drug addict and involved with welfare fraud; and that Jennifer and Elayne had said that their father had not had a sexual relationship with Perlita Manning.

The exhibits are:

- Documents purporting to show that Jennifer had a reputation for gang involvement, drug use, and dishonesty, and that she disliked her father and stepmother. These include letters from Charity Buchen, Patricia Hudson (appellants inform us Jennifer babysat for Hudson's children), Jason Smith (apparently a friend of Jennifer's), and Lourdes Zaragoza, Jennifer's grandmother; and a January 30, 1996, report from Robert Taylor & Associates, private investigators, reporting to then-counsel for appellants on an investigation which included interviews in which Buchen, Hudson, and others stated they disbelieved Jennifer's accusations.

Lourdes Zaragoza's letter also states that Jennifer had said that she had learned from gang members that she could accuse her parents of molestation and be believed. Lourdes Zaragoza submitted a declaration in which she stated that in 1988, she learned that Teresa Ilagan had said that Mr. Zaragoza had molested her. Lourdes Zaragoza declared that she had confronted Marianne Madison, that Madison had threatened to have her killed, and that Madison had recanted any allegation.

-Three letters attesting to Mr. Zaragoza's positive reputation.

-Records which Mr. and Mrs. Zaragoza declared that they obtained from Jennifer's school. These are a Discipline Report showing a number of 1995 suspensions for such things as possession of a beeper; attendance report for the period between September 8, 1994, and January 1, 1996; a form requesting Jennifer's transfer from the Antelope Valley High School District to the Acton High School District, dated October 17, and a letter evidencing the Antelope Valley High School District's assent to the transfer, also dated October 17.

-Documents purporting to evidence Jennifer's gang involvement.

Mrs. Zaragoza declared that she obtained these documents from Jennifer, her room, her trash or her clothing. They consist of a number of pages of what appear to be copies of handwritten notes, some of them in stylized handwriting. Mrs. Zaragoza declared her belief that the writing was typical of gang writing. She typed a version of the text on each page, and in some instances provided a date and such information as "found in pocket of Jennifer"s pants in Oct. 95 after DCFS removed her."

-Records purporting to show Mr. Zaragoza's absences from work.

-Declarations from two friends, Margaret and Steven Ponting, to the effect that they were at the Zaragoza's home on the evening of May 5, 1995, celebrating their wedding anniversary. They arrived at about 6:30 p.m. Mr. Zaragoza was not out of their presence at any time until after Jennifer left the house. He did not molest Jennifer in their presence and could not have molested her without their knowledge. No law enforcement officer or representative from the District Attorney's office ever contacted them about Jennifer's allegations.

Discussion[3]

A party may move for summary judgment if it is contended that the action had no merit. Summary Judgment is properly granted if al the papers submitted show that there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subds. (a) & (c).) A defendant meets the burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. Once the defendant has met that burden, the burden is on the plaintiff to show that a triable

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[3] We have read and considered each of appellants' post-argument letter briefs, and the cases cited therein. Nothing in those cases changes the result here.

issue of fact exists. (Code Civ. Proc., §437c, subd. (o); Union Bank v. Superior Court (1995) 31 Cal.App.4th 573.)

Since a motion for summary judgment raises only questions of law regarding the construction and effect of the supporting and opposing papers, we conduct an independent review on appeal. We identify the issues framed by the pleadings and determine whether the moving party has established facts sufficient to negate the claim. If so, we determine whether the opposing party has established that triable issues of material fact exist. (AARTS Production, Inc., v. Crocker National Bank (1986) 179 Cal.App.3d 1061, 1064.)

Appellants' causes of action for negligence, breach of oral contract, breach of fiduciary duty, conspiracy, and loss of consortium depend on the allegation that respondents committed malpractice by failing to advise them of the statute of limitations on their federal civil rights claims and by allowing the statute to expire. Appellants identified those federal civil rights claims as claims against Detective Wilson and Sergeant Carney for violation of section 1983 based on arrest without probable cause and violation of Brady v. Maryland, supra, 373 U.S. 83, and for malicious prosecution.[4]

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[4] On appeal, appellants also contend that they had a cause of action against Deputy District Attorney Kelly Cromer, who prosecuted the criminal case, on the theory that she interfered with a family law case involving Mr. Zaragoza. Appellants did not identify this theory at summary judgment and proposed no undisputed facts on the subject. Their sole factual citation is to a 1997 memo from Mrs. Zaragoza to Davis, suggesting, inter alia, that Cromer could be sued for negligence, malicious

We first address appellants' contention that they had a claim based on violation of Brady v. Maryland, supra. That cause requires the prosecution to disclose to the defense all evidence which is both favorable to the defendant and material on either guilt or punishment. (In re Sassounian (1995) 9 Cal.4th 535, 544.) Appellants' theory is that a Brady violation is found in Detective Wilson's refusal to follow Mrs. Zaragoza's suggestions regarding the investigation and his failure to include her statements in his report and to thus present them to the District Attorney and the judge who issued the arrest warrant. They cite in support cases such as Jones v. City of Chicago (7th Cir. 1988) 856F.2d 985, 995, which held that a city's attempt to circumvent Brady be keeping secret police files, unavailable to the prosecutor or defense counsel, can constitute a section 1983 violation, and McMillian v. Johnson (11th Cir. 1996) 88 F.3d 1554, which concerned a claim of immunity on a section 1983 cause of action, brought after a criminal conviction was reversed due to the state's failure to disclose exculpatory and impeachment evidence to the defense. The cases do not establish that Brady is violated if a police officer fails to pursue a line of investigation suggested by the defense or to present defense information to a prosecutor and court prior to the issuance of an arrest warrant. We do not believe that it is. Brady concerns the disclosure of the prosecution's exculpatory information to the defense, not the disclosure of the defendant's evidence to the prosecution. It does not require

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prosecution, conspiracy, and other causes of action. This cannot establish that there is a triable issue on whether appellants had a meritorious cause of action against Cromer.

the police investigation appellants sought here. Lack of probable cause for the arrest is an element of the remaining causes of action appellants identified. (Russell v. Smith (2d Cir. 1995) 68 F.3d 33, 36 [claim of malicious prosecution brought under section 1983 governed by state law]; Bertero v. National General Corp. (1974) 13 Cal.3d 43, 50; Beauregard v. Wingard (9th Cir. 1966) 362 F.2d 901, 903 [no section 1983 violation where probable cause for arrest, even if innocence is later established].) An attorney is liable for malpractice only when his or her negligent conduct results in the loss of the client's meritorious claim. (Thomas v. Lusk (1994) 27 Cal.App.4th 1709, 1716.) Thus, to prevail on their complaint here, appellants would have had to establish lack of probable cause for Mr. Zaragoza's arrest.

We agree with appellants that the preliminary hearing finding is not collateral estoppel on the issue of probable cause since there was additional evidence at the preliminary hearing, Elayne's testimony, which was not available to the judge when the warrant was issued. (McCutchen v. City of Montclair (1999) 73 Cal.App.4th 1138, 1147-1148.) However, the finding at the preliminary hearing does establish a prima facie showing of probable cause. (Randleman v. Boeres (1928) 93 Cal.App 745, 752.)

Further, probable cause is established by the evidence gathered by the police. "Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (People v. Price (1991) 1 Cal.4th 324, 410.) Or, as the Ninth Circuit has put it, "Probable cause to arrest exists when 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded

that there was a fair probability that [the defendant] had committed a crime." (United States v. Smith, 790 F.2d 789, 792 (9th Cir. 1986).)" (Barlow v. Ground (9th Cir. 1991) 943 F.2d 1132, 1135.)

Here, Jennifer gave generally consistent accounts of the molestation to her friend, her stepmother, and four police officers. One of those accounts, to Charity Buchen, was made before Mr. Zaragoza took steps to transfer Jennifer from her high school, contradicting appellants' suggestion to the police that Jennifer invented the incidents as revenge for the transfer. What is more, Mr. Zaragoza's stepdaughter told police that he had molested her, and a third teenager who had been living with Mr. Zaragoza's family gave ambiguous information when asked if Mr. Zaragoza was the father of her child. This evidence is more than sufficient to lead a prudent person to entertain an honest and strong suspicion that Mr. Zaragoza had committed the crimes with which he was charged.

Respondents this carried the summary judgment burden of showing that appellants could not establish an element of their case, lack of probable cause. It became appellants' duty to show that a triable issue of material fact on the issue of probable cause existed. This, they did not do.

First, there are numerous problems with the evidence appellants proffered. Many of the exhibits include layers of hearsay and opinions without foundation. Many fail to meet basic rules on authentication of documents. (Evid. Code §1280.) Many of the documents are undated, and few indicate that the information contained therein would be given to the police in a timely manner, if requested. Many contain irrelevant information.

More importantly, even if all the evidence appellants proffered is considered, it does not establish that there is a triable issue on the existence of probable cause for Mr. Zaragoza's arrest. Jennifer's troubles at school, her motive to lie, the opinions of her friends, and other such matters do not obviate probable cause in the face of the other evidence. The same may be said about the school and work records and the Pontings declarations: the fact that Jennifer mistook a date of time does not destroy her credibility or eliminate her statements, or those of Teresa Ilagan or Perlita Manning. And, as respondents argue, the police were entitled to view some of the evidence with skepticism. Mr. Zaragoza's denial of any wrongdoing and Mrs. Zaragoza's statements about Jennifer, her mother, and Marianne Madison certainly fall into that category.

Appellants make much of inconsistencies in Jennifer's various accounts of the molestations. It is true that Jennifer provided more detail in some accounts than in others, and that there are inconsistencies between accounts. For instance, Jennifer gave Deputy Price approximate dates and times for each incident, but told Deputies Bates and Kelleher that she could not remember dates or times. However, "The standard of probable cause does not require indubitable or necessarily convincing evidence, but only so much 'reasonably trustworthy information' as 'to warrant a prudent man in believing that the [arrestee has] committed or [is] committing an offense.' (Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct 223, 225, 13 L.Ed.2d 142 (1964.)" (Easton v. City of Boulder (10th Cir. 1985) 776 F.2d 1441, 1450 [neither contradictions in child's statements regarding molestation nor inconsistencies between child's statement and witness statement undermine probable cause.)

Nor do we agree with appellants that this is an issue which cannot be decided on summary judgment. "Generally, 'the question of probable cause in a section 1983 damage suit is one for the jury.' [Citations.] This is particularly true where the probable cause determination rests on credibility conflicts. [Citation.] However, a district court may conclude 'that probable cause exists as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding,' and may enter summary judgment accordingly. [Citation.]" (Merkle v. Upper Dublin Sch. Dist. (3d Cir. 2000), 211 F.3d 782, 788-789.)

Appellants further argue that judgment was wrongly granted because respondents' summary judgment motions did not address the cause of action for intentional infliction of emotional distress. In that cause of action, appellants alleged that respondents caused them emotional distress by failing to file a federal civil rights case, failing to advise them of the statute of limitations and, concerning Davis, writing a disparaging letter. Respondents' motion contended that the cause of action had no merit. Appellants made no argument to the contrary and on this appeal, they cite only Stanley v. Richmond (1995) 35 Cal.App.4th 1070. That case holds that emotional distress damages are recoverable if caused by an attorney's breach of fiduciary duty. (Id. At p. 1097.) This cause of action thus stands and falls with the malpractice allegations and, as we have seen, judgment was properly granted on those causes of action.

As to Davis, appellants argue that the motion did not address the cause of action for breach of written contract. Davis' motion contended that the cause of action had not merit. Davis proposed as undisputed that he and

appellants had entered into a written agreement in which he agreed to evaluate appellants' civil case. He submitted a declaration in which he stated that he conducted just such an evaluation. Appellants denied the materiality of the proposed undisputed fact, but proposed no facts on the issue, offered no evidence, and made no argument. To the contrary, in support of their theory that Davis agreed to represent them in the civil litigation, appellants submitted evidence in the form of their own deposition testimony that Davis did evaluate the case. Judgment was properly entered on this cause of action.

Appellants have a number of other contentions, but they were denied the right to oral argument, that the judgment must be reversed because the trial court failed to make specific findings and because the trial court failed to continue the hearing on the motion. None of these arguments is persuasive.

Oral argument was held on the summary judgment motions. Appellants; contention is based on the fact that at the beginning of the hearing, the trial court indicated that it was inclined to grant the motions on the statute of limitations ground, but believed that there were triable issues of fact on the question of whether appellants had a viable cause of action against county employees. That was not the ground on which the motion was ultimately decided. Oral argument addressed the statute of limitations issue. Appellants cite no evidence in support of the theory that this constitutes a denial of the right to oral argument, and we do not believe that it is. Further, even where oral argument id denied "there is no per se rule requiring reversal." (Mediterranean Const. Co., v. State Farm Fire & Cas. Co. (1998) 66 Cal.App.4th 257, 267.) Appellants had made no showing of prejudice here.

Next, appellants argue that reversal is required because the trial court did not make specific findings identifying the evidence on various points, such as the probable cause for Mr. Zaragoza's arrest. Appellants cite Code of Civil Procedure section 437c subdivision (g). As respondents argue, the trial court's failure to make sufficient findings under that subdivision does note require reversal "where, as here, our independent review establishes the validity of the judgment." (Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal.App.4th 772, 782.)

Finally, appellants contend that the trial court erred in failing to grant a continuance of the motion so that they could obtain documents from the dependency court. The background is this: at a status conference in February, counsel for appellants indicated that he needed a document from the dependency court (the application for petition) to prepare his opposition to the motions. (Hearing on the summary judgment motions had been set for March.) Counsel told the court that Dempsey had petitioned the dependency court for access to those documents, and that the dependency court had given the civil court jurisdiction over the motion. The court told counsel to make a written motion. No such motion was filed. In a declaration in opposition to summary judgment, counsel for appellants declared that the dependency case had been transferred to Kern County, that he was in process of seeking a waiver of confidentiality for the document, and the document contained evidence tending to exculpate Mr. Zaragoza.

Appellants' contention is that at summary judgment, the trial court was required to observe that appellants lacked a certain document and sua sponte continue the case so that they might attempt to obtain it. Not so. Appellants'

failure to request a continuance of the hearing on the summary judgment motion waived any objection to the trial court ruling. (Lewinter v. Genmar Industries, Inc. (1994) 26 Cal.App.4th 1214, 1224.) Further, even if the declaration of appellants' counsel could be read as a request for a continuance to obtain further discovery, it would not be sufficient for that purpose, since it does not explain why the document could not have been obtained earlier. (A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal.App.4th 349, 357.)

Disposition

The judgment affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG,J.

We concur:

TURNER, P.J.

WILLHITE, J. *

APPENDIX D

SUPREME COURT
FILED
OCT 31, 2001
Frederick K. Ohtrich Clerk
Deputy

Court of Appeal, Second Appellate
District, Division Five-No. B142854
S100960

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSEPH RAYMOND ZARAGOZA, Plaintiff and Appellant,

v.

DANIEL G. DAVIS, Defendant and Respondent.

Petition for Review DENIED.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1130

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RAYMOND ZARAGOZA, JR. AND,
TAMMY ZARAGOZA,

Petitioners,

v.

DANIEL G. DAVIS; MICHAEL D.,
DEMPSEY; DEMPSEY & JOHNSON, P.C.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT
DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI SUPPLEMENT

KENNETH M. STERN
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(818) 716-1101
For Petitioners

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I. BUTLER (1) SHOWS IT REMAINS UNCLEAR WHETHER IT IS FOR THE JURY TO DECIDE WHETHER PROBABLE CAUSE TO ARREST IS TO BE DECIDED BY THE JURY, AS OPPOSED TO, BY THE JUDGE (2) SHOWS A REASONABLE JUROR IN THIS CASE COULD CONCLUDE NO PROBABLE CAUSE TO EXIST, AND, (3) EXEMPLIFIES HOW IN PRACTICE, THERE IS A DIFFERENCE BETWEEN HOW ONE IS TREATED, CONCERNING PROBABLE CAUSE TO ARREST, WHEN ACCUSED OF MOLESTING A CHILD VERSUS OTHER CRIMES; ALTHOUGH, THE LAW DOES NOT DISTINGUISH BETWEEN THE TWO SITUATIONS.

Butler v. Elle 99-335393 (9th Cir. 2/26/2002) decided after the Petition was filed, is instructive on several issues in this case.

The first issue is whether it is up to a jury, or the Court on Summary Judgment, to decide whether probable cause to arrest exists. The weight of authority is that is for the jury to decide the issue. (Pet. pp. 15-17.) However, in Butler the Court ruled it is up to the Court, in decided if qualified immunity exists, to decide whether there was probable cause to arrest. However, if this be so, then the rule that it is for the jury, at trial, to decide whether probable cause to arrest exists, will be rendered a nullity. Once the Court decides the issue relating to qualified immunity, if it decides there is qualified immunity, there is no jury trial; thus, a jury cannot decide the issue.

Butler also shows a reasonable jury could decide probable cause did not exist herein. In Butler, the alleged crimes could have potentially occurred. However, the Ninth Circuit decided that the evidence, that the crime was

committed, was not sufficiently strong to show probable cause to arrest existed.

Herein, the evidence shows that three of the four alleged crimes could not have even been committed. Thus, the evidence of lack of probable cause, herein, is stronger than in Butler. What this shows is that not only could a reasonable juror herein decide thee was not probable cause to arrest; but, there was not probable cause to arrest, herein, as a matter of law.

The difference in the way Butler treated probable cause to arrest therein, and how the Court of Appeal treated probable cause to arrest herein, shows that persons who are unfairly and falsely accused of molesting children, no matter how patently false the allegation, are unfairly held to a different standard than other crimes.

II. RELATED TO EQUAL PROTECTION ISSUES, A NEWLY DISCOVERED CASE SUPPLEMENTS PETITIONERS' PREVIOUS SHOWING PETITIONERS WERE NOT TREATED FAIRLY BY THE CALIFORNIA COURT OF APPEAL.

In the Petition for Writ of Certiorari ("Petition") petitioners showed an instance wherein they were unfairly treated, by the California Court of Appeal; wherein, Court of Appeal Justice Turner, in deciding this case, deviated, from a rule he had discussed, in an article written by him near the time of the issuance of the Opinion. (Pet. p. 28, fn. 20.) Another instance has been found wherein the same Justice, in a previous case, ruled in an opposite manner, on another issue herein.[1]

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[1] Such is not a result of a change in the law; but rather, what could

One issue raised in the petition was that the Court of Appeal failed to apply California law, thereby depriving petitioners the right to equal protection pursuant to the United States Constitution, Fourteenth Amendment. (Pet. pp. 27-29.) One of the areas, to be shown if the Court grants the Petition, regards respondents' breach of fiduciary duty/intentional infliction of emotional distress.

Petitioners pleaded these state law causes of action based upon respondents based upon the same basic facts, respondents abandoning petitioners once respondents realized they had blown the statute of limitation, including the manner in which this occurred.[2] Respondents did not address such causes of action in the summary judgment motions.

However, the Court of Appeal addressed the breach of fiduciary duty cause of action, ruling, by implication, that said cause of action was dependent upon petitioners proving they would have won the underlying action. (Pet. App. p. 11, last paragraph.) The Court of Appeal ignored, and refused to follow, the correct rule; that, (1) respondents could not raise a new defense, on appeal, not raised in their summary judgment motions, and, (2) a cause of action based upon abandonment of a client is not dependent upon whether or not the client would have won the underlying litigation. (See Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1097.)[3]

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objectively construed as a refusal to follow the law in this case.

[2] The Court of Appeal Opinion notes the breach of fiduciary duty cause of action, but not, the intentional infliction of emotional distress cause of action.

[3] Petitioners exhausted these issues in the Petition for Review to the

Petitioners have discovered, since filing the Petition, that in a published Opinion, Justice Turner took petitioners' position herein, that intentional infliction of emotional distress/breach of fiduciary duty, based upon abandonment of the client, is independent of whether the client would have won the underlying action. McDaniel v. Gile (1991) 230 Cal.App.3d. 363[4]. In McDaniel the attorney abandoned the client; as, she would not have sex with the attorney. McDaniel analysis of causes of action for intentional infliction of emotional distress, and breach of fiduciary duty, for abandonment of the client, was wholly unrelated to whether she would have been successful in the underlying litigation. While that was an issue, in the legal malpractice cause of action in McDaniel, such was independent of the abandonment issues.

As such, Justice Turner refused to apply a rule of law, herein, which he had followed in McDaniel.[5] While petitioners recognize a reviewing court prefers not to see an

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California Supreme Court.

[4] While this case is newly discovered caselaw, as opposed to newly decided caselaw, it is unclear whether reference to such complies with this Court's rules concerning supplementing a Petition for Writ of Certiorari. However, even it technically does not comply with the rule, it is suggested that this Court has the inherent power to, and should, consider such. That is because is shows, due to the fact that this is a second instance wherein one of the Court of Appeal Justices deciding this case failed to follow his own previous statements of the law in finding against petitioners, that petitioner's did not receive a fair hearing in the California Court of Appeal.

[5] Of course, the petition shows numerous other instances wherein the California Court of Appeal refused to follow the law.

argument that a lower court has deliberately refused to follow the law, it cannot be ignored herein that a reasonable person could objectively determine, based upon the two instances wherein Justice Turner deviated, in this case, from rules of law which he had previously acknowledged to be correct.

While petitioners also recognize that this Court cannot review every case simply upon the basis that the Court of Appeal did not fairly decide a case, that situation herein, when coupled with other factors which show that this Court should grant Certiorari, is a factor this Court should consider.

III. CONCLUSION.

In the 1980's the "witchhunt hysteria" concerning child sexual abuse centered around day care centers.[6] In the 1990's the "witchhunt hysteria" concerning child sexual abuse centered around coaches of athletic teams. Now, in the 2000's the "witchhunt hysteria revolves around Catholic Priests.[7] To say the media is currently deluged with stories

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[6] The comments regarding "witchhunt hysteria" do not refer to cases wherein there is appropriate investigation, analysis and prosecution of cases wherein their truly is reason to believe the alleged crime was committed. Nor does use of the phrase "witchhunt hysteria" mean to infer that the great majority of allegations are true. Petitioner's are certainly as opposed to child molestation as anyone else. However, the fact that most allegations may be true, and involve a heinous crime, does not mean that it is permissible to ruin the life of someone who is falsely accused. The "witchhunt hysteria" refers to situations wherein, as occurred with Mr. Zaragoza, there is prosecution, without proper investigation or analysis, and the concealment of exculpatory evidence, in cases wherein it is blatantly clear that the alleged molestation did not happen.

[7] Again, this is not to imply that the majority of accusations that have

concerning Catholic Priests molesting children would be a huge understatement. It appears that some accused Priests are already being considered to be guilty by mere accusation, by the media, law enforcement and even the Church itself. Priests are expressing the concern that fear of false allegations of child molestation are interfering with their ability to do their jobs in ministering the needs of their parishioners.

> "Roman Catholic priests in Los Angeles expressed frustration and anguish Friday as they attended a mandatory archdiocesan workshop on sex abuse ordered by Cardinal Roger M. Mahony.
>
> ... many priests already feel under siege--victims of the national furor over clergy sex abuse that began earlier this year in Boston.
>
> 'Catholic priests feel they're being picked on,' said Father John Raab of the Claretian Renewal Center in Los Angeles, one of more than 200 priests who attended the workshop at St. Agatha Church in southwest Los Angeles. 'People feel that, because the Catholic Church has so much centralized money, it gets the lawsuits and news."Several priests lamented that the furor has caused them to shrink back from normal gestures of affection, such as hugging children. Father

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been, and will be, forthcoming are not true. However, there will undoubtedly be false allegations by some (1) who believe they may be able to make money in lawsuits, (2) who are mentally ill, or, (3) may have some other vendetta or motive to lie.

Roger Labonte of Holy Family Church in South Pasadena said he has found himself hesitating over whether to place his hands on a parishioner's head during absolution rituals, straighten an altar server's collar or even take some neighborhood children to a movie. After Mass last Sunday, he said, several children ran to him, hugging his legs, but he kept his arms straight at his side.

... Labonte, a Canadian native who said that touch is important in his culture, said the self-imposed restrictions are 'just not me.' 'I can't pick the children up and hug them and squeeze them,' said Labonte, 48, who quit an accounting career eight years ago to become a priest and is particularly popular with children, who are drawn to his youthful energy. 'I think we're guilty until proven innocent[8] and that's a sad thing.'

... For many of the priests, the workshop provided the first time to gather and share their feelings since allegations of widespread abuse in the Boston Archdiocese fanned the issue into a national firestorm. During a question-and-answer period, according to those present, priests raised several concerns, including whether to hug a child on a playground, keep confessions confidential and whether innocent priests would be duly protected with legal representation.

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[8] He is right.

> ... Despite the news focus on accountability, several of the priests said they felt besieged by a public perception of rampant sex abuse in the priesthood. Father Greg Boyle, who helps rehabilitate hundreds of gang members through jobs in his Homeboy Industries, said he now feels solidarity with the legions of good Los Angeles police officers who were tainted by a few bad cops in the Rampart corruption scandal. 'You want to say, 'That's not me,'Boyle said." (Los Angeles Times, March 16, 2002.)

Whether it be a school teacher, an athletic coach, a member of the clergy, or, as the case of Mr. Zaragoza, a father trying to keep his daughter from destroying her life, no one should be subject to prosecution for blatantly false allegations of molestation.

Dated: April 3, 2002

LAW OFFICES KENNETH M. STERN

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